

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DEEMA ROY BREEDING,

Plaintiff,

v.

JACKLYN JACKSON, *et al.*,

Defendants.

Case No. 4:05-CV-42

Hon. Richard Alan Enslen

ORDER

It appears from the record that United States Magistrate Judge Ellen S. Carmody filed a Report and Recommendation on November 14, 2005. The Report recommended that this Court grant Defendants Nancy Lange and Douglas Parkhurst's Rule 12(b)(6) Motion to Dismiss, dismiss other claims as unexhausted, and deny Plaintiff Deema Roy Breeding's Petition for Addendum ("Motion to Amend"). Before Judgment was entered on the Report, Plaintiff Deema Roy Breeding filed a belated Response.

Plaintiff's belated Response included both new medical documents and new grievance documents. While the Court would ordinarily rule on the belated Response as an objection to the Report, in this case there is a significant reason for not doing so. The failure of Plaintiff to comply with the service Order of April 26, 2005 as to Defendants Frank Olney, Jeremy Hall and Jim Armstrong may independently justify dismissal of those claims under Federal Rule of Civil Procedure 4(m) and Federal Rule of Civil Procedure 41(b). However, before such a dismissal could be ordered, the Court must provide Plaintiff with notice and an opportunity to be heard on those issues (which will be afforded by receipt of briefing on the Rule 4(m) and 41(b) issues). As such,

this is an appropriate case to vacate the Report and “recommit the matter to the magistrate judge with instructions” in accordance with Western District of Michigan Local Civil Rule 72.3(b).¹

THEREFORE, IT IS HEREBY ORDERED that the Report and Recommendation is **VACATED** for the purpose of receiving further review by the Magistrate Judge, after notice and opportunity to be heard, regarding the dismissal of unserved parties pursuant to Federal Rules of Civil Procedure 4(m) and 41(b).

IT IS FURTHER ORDERED that Plaintiff shall file a second responsive brief on said issues within 21 days of this Order, and Defendants may reply to both responses within 14 days of the second response.

DATED in Kalamazoo, MI:
December 20, 2005

/s/ Richard Alan Enslen
RICHARD ALAN ENSLEN
SENIOR UNITED STATES DISTRICT JUDGE

¹The Report relied in part on the “total exhaustion” rule of *Jones-Bey v. Johnson*, 407 F.3d 801, 801 (6th Cir. 2005), which is controversial, *see Garner v. Unknown Napel*, 374 F. Supp. 2d 582 (W.D. Mich. 2005). It may well be, though, in light of the other issues that such reliance was unnecessary because some or all of those claims could be dismissed on a separate basis. The Court leaves all of these matters to the Magistrate Judge’s further determination.